IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City Human Resources Administration and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission,

Appellants,

v.

PATRICK Mc L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS, and SYLVIA CASTRO, individually and on behalf of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

The named Appellees are four of approximately twenty permanent resident aliens who, prior to December 28, 1970, were employed by private organizations which

were merged into the New York City Human Resources Administration on that date. The City program was directed to the improvement of job skills among the unemployed and the under-employed. When the private organizations were merged into the City program, plaintiffs were hired by the City, and assured their positions and salaries would be the same. Shortly after their City employment commenced, however, plaintiffs were discharged pursuant to New York Civil Service Law §53 subd. 1. (McKinney 1959), solely because of their alienage.

The amended complaint sought the convening of a three-judge court, an order that the action be maintained as a class action pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, a temporary restraining order pursuant to 28 U.S.C. §2284(3), a declaratory judgment pursuant to 28 U.S.C. §2201 and 2204 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, preliminary and permanent injunctions and damages to each plaintiff of $10,000 for lost earnings. (A 10-12).

On March 11, 1971, by order to show cause plaintiffs, alleging that Section 53 violated the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause of the Constitution, and their right to travel among the states, moved an order treating the named plaintiffs as representatives of a class, the convening of a three-judge court, preliminary and permanent injunctive relief.

On May 4, 1971, appellants moved to dismiss the action for lack of jurisdiction over the subject matter (A 30-34).

On July 13, 1971, the appellants moved for a summary judgment dismissing. (A 74-77).

The single District Court judge found plaintiffs raised a substantial constitutional question and recommended the convening of a three-judge court.

Pursuant to the May 26, 1971 order of Chief Judge Henry J. Friendly, plaintiffs' motion for declaratory judgment, injunctive relief and determination of class action were submitted to the statutory three-judge court which heard argument on July 13, 1971.

SUMMARY OF ARGUMENT

New York Civil Service Law §53 subdivision 1. excludes aliens from the competitive class of civil service employment denying Appellees, who are lawful resident aliens, the equal protection of the laws.

Classifications based on alienage are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971).

Excluding the entire class of aliens from civil service employment satisfies no compelling state interest and bears no rational relationship to Appellees' competence or fitness for employment.

The Appellant argues that compelling state interest demands loyalty from employees that only citizens can provide. If New York is concerned with matters of security then the state is endeavoring to pre-empt the exclusive power of Congress and the federal government. When the Appellant endeavors to overcome the Supremacy Clause on the basis of a greater loyalty, the argument fails because it is irreconcilable with other

sections of the Civil Service Law that do not exclude non-citizens.*

The Appellant also states that aliens are unstable and the need for stable and efficient government requires hiring citizens. No demonstration is made, for instance, that resident aliens residing in New York are less stable than citizens entering New York from other states.

The efficiency and stability argument is nothing more than an attempt to reserve the economic resources of the state for citizens. The court has stated that discrimination based on economics is withourt justification. *Graham v. Richardson*, 403 U.S. 365 (1971).

The power to regulate aliens is exclusively the power of the federal government. Congress has promulgated a comprehensive plan for regulation of immigration and naturalization and has granted aliens the full and equal benefits of all laws. 42 U.S.C. §1981 (1970). §53 subdivision 1. infringes upon this exclusive power of Congress.

Denying civil service employment to aliens in effect denies aliens the right to enter and reside in New York and violates their constitutional rights. Limitations on employment works to segregate aliens and exclude them from New York.

The language of the statute, in question, is clear and unambiguous and inquiry into legislative intent elicits no

*New York Civil Service Law Section 35 states that civil service is divided into the classified and unclassified service. Sections 41, 42, 43 and 44 describe the classified services.

§41. Exempt Class
§42. Non-Competitive Class
§43. Labor Class
§44. Competitive Class

expression of intention by the legislature. An examination of the history of the year of enactment and perusal of various unofficial communications provide little except support for the unconstitutionality of the statute.

ARGUMENT

I.

NEW YORK CIVIL SERVICE LAW §53 SUBDIVISION 1., WHICH EXCLUDES ALIENS FROM THE COMPETITIVE CLASS OF CIVIL SERVICE EMPLOYMENT IS "INHERENTLY SUSPECT" AND DISCRIMINATES UNREASONABLY AGAINST ALIENS AND THUS DENIES THEM THE EQUAL PROTECTION OF THE LAWS.

To qualify for the competitive class of civil service employment a person must be a citizen of the United States. Such classification is inherently suspect. It bears no relationship to an individual's character or competence to fill a position. Therefore, the statute denies the equal protection of the laws to lawful resident aliens such as Appellees.

A. Laws Which Deny Aliens Lawful Employment Are Inherently Suspect and Subject To Close Judicial Scrutiny.

Clearly, aliens are "persons" and thus protected by the Equal Protection Clause of the Fourteenth Amendment, *Graham v. Richardson*, 403 U.S. 365, at 376, (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 369(1886), (rights of Chinese aliens to work unmolested in laundries); *Galvan v. Press*, 347 U.S. 522, 530 (1954). "So long settled as to be beyond the pale of controversy is the proposition that

the long reach of the Fourteenth Amendment extends to the alien." *Hosier v. Evans*, 314 F. Supp. 316, 319 (D.C. Virgin Islands, 1970). Moreover, discrimination against individuals on the basis of alienage "like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, (1971); *Oyama v. California*, 332 U.S. 633, 640, 646 (1948); *Takahashi v. Fish and Game Commission*, 335 U.S. 410, 420 (1948); *Sei Fujii v. State*, 79 Cal. Rptr 77, 86, 456 P2d 645, 654 (1969). Such criteria for classification are "constitutionally suspect", *Bolling v. Sharpe*, 347 U.S. 497, (1954) for the obvious reason that such considerations are generally irrelevant to constitutionally acceptable legislative purposes, often masking simple prejudice or irrational antagonism toward groups of people. As with race, this has also been true of discrimination against aliens and nationality groups, which historically has been rooted in deep prejudice, hostility for fear of the foreigner.

> "Aliens as a class are a prime example of a discrete and insular minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n. 4 (1938) for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in Takahashi, 335 U.S., at 420, that . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Graham*, 403 U.S. 365, 375.

The Court also said, as it had earlier in *Takahashi* where it struck down a California statute denying fishing licenses to aliens, that discrimination based on alienage as discrimination based on race is "inherently suspect". *Graham v. Richardson, supra.*

Denied the right to vote, aliens "lack the most basic means of defending themselves in the political processes. Under such circumstances, courts should approach discriminatory legislation with special solicitude". *Purdy & Fitzpatrick v. California,* 71 Cal. 2d 566, 79 Cal. Rptr. 77, 456 P.2d 645, (1969) (holding public employment citizenship requirements unconstitutional).

In *Truax v. Raich,* 239 U.S. 33, 36 S.Ct. 710, (1915), Arizona's statute which limited to 20% of the work force the number of aliens who could be employed by any business of more than 5 workers was held violative of the Fourteenth Amendment:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

Takahashi, supra, has narrowed the special public interest doctrine arising from the distinction between "rights and privileges" as enunciated in *Heim v. McCall,* 239 U.S. 175 (1915).

"In *Graham v. Richardson* 403 U.S. 365, 374 (1971) the Court said:

> "But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as 'privilege.' *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Shapiro v. Thompson,* 394 U.S. at 627, n. 6; *Goldberg v. Kelly,* 397 U.S. 254, 262 (1970); *Bell v. Burson,* 402 U.S. 535 (1971)."

In *Takahashi, supra,* and *Shapiro, supra,* the Court found the various states did not meet the heavy burden of justifying their statutory discriminations. The preservation of public funds was not a compelling need. Cf. *Shapiro, supra,* and *Takahashi, supra.*

> "Since aliens contribute to the public treasury by paying state and local taxes, they have the same interest as citizens for expenditures of such funds. In fact, an alien may have contributed funds to the state government for years and yet be excluded from working for the state, while a recent arrival to the state, although he has made little if any contribution to the state can become a public employee if he is a United States citizen." *Discrimination Against Mexican Aliens*, 38 Geo. Wash. L.R.

Aliens not only pay taxes but they are bound by federal, state and local laws. They must observe traffic, sanitation, health and compulsory education laws. They are bound by the individual state rules for marriage and divorce. Aliens are bound by and subject to every law, code and rule in the conduct of their business or employment.

They pay Federal and local income and inheritance taxes and all other local taxes, such as sales and real property taxes. As taxpayers they are entitled to enjoy the economic fruits of the taxes they pay and when indigent they are entitled to welfare.

B. The Exclusion of Lawful Resident Aliens From the Competitive Class of Civil Service Employment Poses No Compelling State Interest.

The Appellant contended that New York State was justified in excluding aliens from the competitive class on two grounds: First, the exclusion of aliens is related to efficient and stable government administration and secondly, the state government is entitled to employ persons of undivided loyalty.

The Three-Judge Court pointed out, in its decision, that the Appellant has not demonstrated that a permanent resident alien would be a poorer risk than a citizen of the United States. The Court took judicial notice of the mobility of "today's society" and that numerous people move to major urban areas for short periods to pursue adventure, glamour, and career experience. (A 84-85).

The Appellant argued that aliens are less likely to remain in the United States then citizens, but offered no proof that citizens remain in New York State longer than aliens.

The efficiency and stability argument is ultimately reduced to an argument of economics. The hiring and training of personnel is costly to the state. Even assuming for purposes of argument, that resident aliens are a less stable class than citizens, and no evidence has been introduced to prove this, saving money or limiting expenses is no justification when used to discriminate against aliens.

> "We agree with the three-judge court in the Pennsylvania case that the 'justification of limiting expenses is particulary inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.' 321 F. Supp. at 253. See also *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566, 581-582, 456 P.2d 645, 656 (1969). There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State." *Graham v. Richardson, supra* at 376.

The Appellant relies upon *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), for the proposition that the government can establish qualifications for employees that would insure integrity and efficiency of its operations and thereby exclude aliens from employment (Appellant's Brief, pg. 13). In *United Public Workers v. Mitchell, supra*, the Court was concerned with off-duty political activities of an employee of the United States, in violation of the Hatch Act. The Court concluded that Congress could regulate employees' political activities and explained:

> "Nevertheless, if in free time he [the employee] is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement of preferment with superiors. Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. 75, 101.

The case at bar does not challenge the regulatory powers of the state government over its employees. The New York statute (§53 subd. 1) discriminates against employment of aliens, not the regulations of employee activities.

The qualifications for employment, including loyalty, must be determined for each individual with appropriate safeguards for protecting the individual's personal liberties.

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by

means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U.S. 479, at 488 (1960).

Every state makes extensive inquiry into the character and competence of prospective employees. Most states provide for probationary employment periods before a new employee receives the benefits of tenure and during a probationary period an employee may be discharged who has not met all of the particular state's standards. Finally, even tenured employees may be discharged for cause.

It is undisputed that the Appellees and the class they represent are lawful resident aliens. They have obtained the requisite permission and have been approved for permanent residence by the Immigration and Naturalization Service. The Appellees have met the rigorous security standards of 8 U.S.C. §1182(a) which enumerates the classes of aliens ineligible for admission to United States. Section 1182 generally excludes all persons of criminal, moral and mental turpitude. It also excludes security risks such as anarchists, members of the Communist Party of the United States or advocates of world communism, advocates of the overthrow of the United States Government and generally advocates and members of organizations having doctrines for the establishment of totalitarian dictatorships. 8 U.S.C. §1182(a)(28). The Appellants cannot be presumed to argue that the State of New York requires a higher standard of security.

No showing of any kind has been made that aliens as a class are automatically disloyal. In fact, ". . . there are no rational grounds for believing that all residents who are not also citizens are ipso facto lacking in loyalty or commitment to abide by the laws of the land." *Raffaelli v. Committee of Bar Examiners*, Cal. 3d , 101 Cal. Rptr. 896, at 903 (1972).

II.

NEW YORK CIVIL SERVICE LAW §53 SUBDIVISION 1. CONFLICTS WITH SUPREMACY CLAUSE OF THE CONSTITUTION. THE POWER TO REGULATE ALIENS IS THE EXCLUSIVE POWER OF THE FEDERAL GOVERNMENT AND PRECLUDES THE STATES FROM DISCRIMINATION AGAINST ALIENS IN EMPLOYMENT.

The sole regulation of aliens is invested in the federal government as part of its power to regulate foreign commerce, to conduct foreign relations, to establish a uniform rule of naturalization and the inherent power of any national sovereign to control immigration. See *United States Constitution, Article I*, §8 cl. 3. The federal power to excluse aliens is absolute. *Fong Yue Ting v. U.S.*, 149 U.S. 698, 705-07 (1893); see in general Note, 71 Yale Law Journal 760 (1962). State action pertaining to non-citizens, if not entirely restricted, is sharply limited. A Pennsylvania statute requiring alien registration was struck down as preempting federal authority. *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

Congress has laid down a comprehensive regulatory scheme which controls the admission,[4] continued residence and naturalization of aliens. *Immigration and Nationality Act of 1952, as amended 8 U.S.C. Section*

1101 et seq. Of particular relevance, Congress has enacted legislation concerning the employability of immigrating nationals. Congress has excluded those aliens deemed unemployable, 8 U.S.C. §1182(a). Aliens who are paupers, beggars, vargants, or are likely to become public charges will not be admitted. 8 U.S.C. §1182(a) 8, 15. Finally, as to those aliens seeking entry for purposes of performing skilled or unskilled labor, a certificate from the Secretary of Labor concerning the availability of work is a prerequisite to admission. 8 U.S.C. §1182(a) 14.

The existence of this comprehensive scheme of federal regulation concerning the employability of aliens precludes any state regulation beyond the intent of Congress:

> "Where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz, supra,* at 66-67.

A state law which prohibits employment of aliens, aliens who have been admitted by federal officials, only because of their citizenship status clearly conflicts with the federal scheme and is null and void.

> "The scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 at 230. (1947).

In *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7 (1915), a state statute which limited the number of aliens who could be employed in private business was struck down:

> "The authority to control immigration–to admit or exclude aliens–is vested solely in the federal government. *Fong Yue Ting v. United States*, 149 U.S. 698 . . . The assertion of an authority to deny to aliens the opportunity to earn a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality." *Truax v. Raich*, 239 U.S. 33 at 42 11, quoted in *Takahashi v. Fish and Game Commission*, 334 U.S. 410, at 916 (1948).

Cf. *Oyama v. State of California*, 332 U.S. 633, 649, (Justices Black and Douglas, concurring.)

> "Congress has provided strict immigration tests and quotas. It has also enacted laws to regulate aliens after admission into the country. Other statutes provide for deportation of aliens . . . all of this means that Congress, in the exercise of its exclusive power over immigration, *Truax v. Raich* . . . decided that certain Japanese, subject to federal laws, might come and live in any one of the states of the Union. The Supreme Court of California has said that one purpose of that State's Land Law [which prohibited aliens from owning agricultural lands] is to 'discourage the coming of Japanese into this state' . . . California should not be permitted to erect

> obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country."

Compare *Union Colliery v. Bryden*, [1899] A.C. 580 (Can.), holding *ultra vires* a British Columbia statute prohibiting employment of Chinese in the mines, cited in *National Power to Control State Discrimination against Foreign Goods and Persons; A Study in Federalism*, 12 Stan. L. Rev. 355, 369 (1960). But cf. *Heim v. McCall*, 239 U.S. 175 and *Crane v. New York*, 239 U.S. 195 (1915).

Moreover, it is easy to contemplate the direct impact on foreign relations of such discrimination against aliens. Foreign nations, some of whom provide free medical care to United States travelers, must be disturbed by a United States which first welcomes foreign nationals to its shores, requiring them to undergo a rigorous admission procedure, and then inconsistently allows its states to arbitrarily deny them the means to survive.

> "Yet, even in absence of a treaty, a State's policy may disturb foreign relations . . . Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there [citations omitted]. If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with these problems." *Zschernig v. Miller*, 389 U.S. 419, 441 (1968).

The restriction of §53 of the *New York State Civil Service Law* is certain to interfere with the conduct of foreign relations because it expressly contravenes the

principles of the *United Nations Charter*, 59 Stat. 1031, and the *Charter of the Organization of American States*, 2 UST 2394 (1951). One would be hard pressed, as a representative of the United States, either before a single foreign dignitary or at a meeting of the United Nations or the Organization of American States to justify or explain New York's restriction in light of the declared purpose of the United Nations to "...develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." *Cf. Oyama v. State of California*, 332 U.S. 633, 649-650, (Justices Black and Douglas concurring), 673 (Justices Murphy and Rutledge concurring). The principles of the *Organization of American States Charter*, whose "Member States agree upon the desirability of developing their social legislation on the following bases: (a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security." *United Nations Charter, Chapter 1, Article 1 Subparagraph* (2); *Charter of the Organization of American States, Chapter VII, Article 29.*

The statute is inconsistent not only with federal regulation of non-nationals expressed in our Immigration Laws, but also with the alien protection laws found in our Civil Rights Act of 1866, and formerly codified as part of the Immigration Law under 8 U.S.C. §41:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

This statute has repeatedly been held applicable to discrimination in employment, see e.g., *Arrington v. Massachusetts' Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass., 1969), *Young v. International Telephone and Telegraph Co.*, 438 F.2d 757 (1971) (Third Circuit, 2/11/71), and specifically to discrimination against aliens. *Takahashi v. Fish and Game Commission*, 335 U.S. 410 (1948). Though technically not subject to suit under the 1964 Civil Rights Act, by discriminating against non-nationals, the State of New York is violating the stated public policy of the United States that aliens should not be subjected to discrimination in employment. As such New York has overreached its lawful power. See *Takahashi, supra.*

The United States Supreme Court has recently ruled that states cannot pre-empt the authority of the Federal Government ot regulate welfare benefits for aliens and citizens. *Graham v. Richardson*, 403 U.S. 365 (1971). The court did not wish to deal with the power of Congress to enact a nationwide residency requirement for welfare recipients but as to the individual states it stated:

> "Under Art. 1, §8, cl. 4 of the Constitution, Congress' power is to 'establish a uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

The New York Civil Service Law, Section 53, illegally pre-empts the power of the federal government to regulate the employment of aliens.

III.

THE EFFECT OF THE DENIAL OF CIVIL SERVICE EMPLOYMENT IS TO DENY ALIENS THE RIGHT TO ENTER AND RESIDE IN THE STATE IN VIOLATION OF THEIR FIRST AND FOURTEENTH AMENDMENT RIGHTS.

Denial of the right to public employment to aliens results in impairing their right to travel. New York State and its subdivisions employ nearly one-half million people. Speculatively, other than the federal government, New York State is the single largest employer in the nation. The Civil Service statute inhibits an alien from considering New York State a place to make one's home. In *United States v. Guest*, 383 U.S. 745, 757-758 the court stated:

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."

In *Truax v. Raich*, 239 U.S. 33, the Court stated:

> "The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."

In *Truax*, the Court stated that the practical result of the limitations on employment of aliens would cause aliens to be segregated in those states that would offer them hospitality. This clearly would be an infringement on the right to travel, a right granted by the federal government at the time admission to the United States was offered to aliens.

A Connecticut statute that imposed a time restriction on the right of non-resident indigent persons to receive public assistance was held to effect an impermissible restriction on the right to travel. *Shapiro v. Thompson*, 394 U.S. 618, 634. The Court stated:

> "The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from state to state or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."

In *Graham v. Richardson*, 403 U.S. 365, 375 (1971) Court referred to *Shapiro, supra* and *Guest* in discussing the right to travel and said:

> "It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement."

IV.

THE APPELLANT CANNOT SUPPORT ITS ARGUMENTS OF LOYALTY OR THE NEED FOR STABLE AND EFFICIENT GOVERNMENT ADMINISTRATION BY EXCEEDING THE LEGISLATIVE INTENT EXPRESSED ON THE FACE OF THE STATUTE.

The Appellant endeavors to establish that New York is not unjustly discriminating against aliens. The belabored arguments of the need for loyal employees who will pursue employment in competitive civil service as a

lifetime career must be reviewed within the context of what the legislature was trying to accomplish by the statute. Appellees maintain that the law was solely intended to deny them their constitutional rights. One possible method of examining the Appellant's argument is to see if it is supported by legislative intention.

The legislative intent concerning an enactment must first be obtained from the words or language of the enactment and the courts may not speculate as to intention beyond the words of the statute. *56 NY Jur., Statutes §113.* When the statute is clear and unambiguous the courts must give a plain effect to its meaning. *56 NY Jur., Statutes § 114.* The words of the statute excluding non-citizens from employment have the clarity of fine crystal. The Appellant endeavors to read meaning and interpretation into the statute which the clarity of the words do not allow.

If the language of a statute is unclear, ambiguous, or if the legislative intention is contrary to the literal meaning of the words the intent of the legislature will prevail. *56 NY Jur., Statutes §123.*

The language of § 53 subdivision 1 is clear and unambiguous. § 53 subdivision was first amended to add the relevant discrimination against aliens, in 1939*. The "Bill Jacket" maintained by the state legislature at the Capitol in Albany, New York, has been examined in an effort to uncover any legislative intention. The bill jacket did not contain any committee reports, minutes of floor debate or a message from the then Governor Herbert H. Lehman. The bill jacket did contain several memoranda to the Governor and to the Legislative Committee and several letters form interested parties and organizations.

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*The present statute as amended still contains the same discrimination against aliens originally enacted in 1939.

Some letters and memoranda recommended that the bill** not pass because it would exclude aliens from certain technical positions that could only be filled by them, such as Swedish Masseurs, and because it excluded persons who had filed intentions to become citizens.

The year the provision was first enacted, 1939, was a time when this country was beginning to recover from its most severe economic depression. The country was emerging from a period of political isolation and two and one half years hence the United States would be involuntarily drawn into World War II.

Several letters in the bill jacket, reflect the political and economic climate. One memorandum reads, in part, as follows:*

> "I cannot conceive of any valid objection to incorporating this rule into the law. I would object to a resident bill, perhaps, but not to a citizenship bill. If we cannot find anyone in the whole United States who can qualify for a position, then we must certainly be in a pretty bad fix."

The bill jacket also contained a memorandum from Philip F. Brueck:*

> "The purpose of the merit system is to eliminate political manipulation and appointments by the spoils system. When non-residents and aliens are

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**Referred to as the Babcock Bill, Senate Print No. 2405, Assembly Int. No. 1490.

*Memorandum for the Governor, dated 6/1/39 and subscribed with the typewritten initials "N.R.S."

*Undated Memorandum by Philip F. Brueck of the Legislative Committee who from another in the bill jacket, is identified as the Legislative Chairman of the Civil Service Forum.

allowed to become employees of this state, the purpose of non-political appointments is side-tracked, and in its place will be found that non-taxpayers and persons who owe allegiance to countries other than the United States, are employed in positions rightfully belonging to those citizens who have been residents. In a great state such as New York, there will never be a necessity to go outside of the State to bring in men of ability and talent for within this state we have the richest human resources to select from. There seems to be no reason why New York taxpayers should pay the salaries of aliens, especially those from Canada, when in the native countries of these same aliens, not only is it impossible for an American to obtain a civil appointment but it is hardly possible for him to obtain private employment. In the enactment of this measure, a long borne abuse will be stopped. The legislators as representatives of people of the State must recognize the will of the citizens of the state to confine public employment to citizens who are residents of the state."

§53, subdivision 1 has been enacted without any authoritative expression of legislative intention. Further, its language clearly expresses the only purpose of the statute, to discriminate against an entrie class of persons in violation of the United States Constitution. The polemics of several interested individuals, while carrying little weight, merely reflect this purpose.

CONCLUSION

For the reason stated it is respectfully submitted that the order of the court below should be affirmed.

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*Attorney for Appellees wishes to acknowledge the assistance of Philip Bertenthal and Carolyn Kubitschek in the preparation of this brief.